

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>SCHIFFER PUBLISHING, LTD., et al.,</b>	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>CHRONICLE BOOKS, LLC, et al.,</b>	:	<b>No. 03-4962</b>
<b>Defendants.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**May 24, 2005**

On November 12, 2004, this Court found that Defendants Chronicle Books, LLC (“Chronicle”) and The Ivy Press, Ltd. (“Ivy”) infringed the copyrights of Plaintiffs Schiffer Publishing, Ltd. (“Schiffer”), Connecticut Quilt Search Project, Shirley Friedland, Constance Korosec, and Leslie Piña (collectively “Plaintiffs”) by including Plaintiffs’ photographs in Defendants’ book without permission or compensation. On January 11, 2005, this Court awarded Plaintiffs \$150,000.00 in statutory damages and permanently enjoined Defendants from selling their book, *1000 Patterns*, within the United States. Plaintiffs now move for costs and attorneys’ fees, seeking a total of \$63,069.44 in costs and \$828,055.00 in attorneys’ fees. For the reasons that follow, this Court awards Plaintiffs \$50,562.44 in costs and \$205,586.67 in attorneys’ fees.

**I. BACKGROUND**

As the Court has repeatedly set forth the relevant facts in this case, only a brief restatement is necessary here. *See Schiffer Publ’g v. Chronicle Books*, 350 F. Supp. 2d 613 (E.D. Pa. 2004) (“*Summary Judgment Opinion*”); *Schiffer Publ’g v. Chronicle Books*, Civ. A. No. 03-4962, 2004

U.S. Dist. LEXIS 23052, 2004 WL 2583817 (E.D. Pa. Nov. 12, 2004) (“*Infringement Opinion*”); *Schiffer Publ’g v. Chronicle Books*, Civ. A. No. 03-4962, 2005 U.S. Dist. LEXIS 416, 2005 WL 67077 (E.D. Pa. Jan. 11, 2005) (“*Damages Opinion*”). Plaintiffs’ photographers created photographs of fabrics and textiles which were reproduced in books published by Schiffer. *Infringement Opinion*, 2004 U.S. Dist. LEXIS 23052, at \*2-14. Based in part on the creative choices Plaintiffs made in taking their photographs, this Court concluded that Plaintiffs held valid copyrights in those photographs. *Id.* at \*28.

Between 2001 and 2002, Ivy packaged *1000 Patterns*, a book surveying the development of patterns in different cultures throughout history. *Id.* at \*3. The book’s author selected source images to be included in *1000 Patterns*, often physically cutting such images out of the source book and scanning them into digital form. *Id.* at \*11. Plaintiffs’ books comprised some of the sources for *1000 Patterns*, and over 100 scanned images from Plaintiffs’ books were ultimately included in *1000 Patterns*. *Id.* Chronicle created the cover for the United States edition of *1000 Patterns* and included three images from Plaintiffs’ books on that cover. (R. at 165-72 (Aug. 23, 2004); compare Pls.’ Trial Ex. 18 with Pls.’ Trial Ex. 31.)

Ivy contracted with Chronicle to distribute and market *1000 Patterns* in the United States. The distribution contract contained an indemnity provision whereby Ivy agreed to reimburse Chronicle for any damages or costs in connection with claims of infringement. (Pls.’ Trial Ex. 38 ¶ 13; Defs.’ Mem. in Supp. of Opp’n Ex. A (“Carswell Aff.”) ¶¶ 14-16.) Ivy does not have insurance to cover such costs. (Carswell Aff. ¶ 14.)

*1000 Patterns* was first published in March 2003, and Plaintiffs learned of the book in June 2003. (R. at 231-32 (Aug. 23, 2004).) On September 3, 2003, Plaintiffs filed their Complaint,

asserting claims for violations of the Lanham Act, Copyright Act, and Digital Millennium Copyright Act (“DMCA”), as well as state law claims for unfair competition and unjust enrichment. (*See* Am. Compl.) On August 11, 2004, the Court granted summary judgment in favor of Defendants on the Lanham Act and state law claims. *Summary Judgment Opinion*, 350 F. Supp. 2d at 620. On August 22 and 23, 2004, this Court conducted a bench trial on the Copyright Act and DMCA claims. The Court found in favor of Plaintiffs on the Copyright Act claim and in favor of Defendants on the DMCA claim.

## **II. STANDARD OF REVIEW**

Section 505 of the Copyright Act governs the award of attorneys’ fees in copyright actions. It states that “[i]n any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . . [T]he court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505 (2004). Accordingly, attorneys’ fees are not mandated in every case but rather “are to be awarded to prevailing parties only as a matter of the court’s discretion,” when such an award would “encourage the production of original literary, artistic, and musical expression for the good of the public.” *Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994). A court must follow an “evenhanded” approach in awarding attorneys’ fees, i.e., it must use the same standards notwithstanding whether the plaintiff or the defendant has prevailed. *Id.* As with all fee petitions, the moving party (here, Plaintiffs) has the burden of demonstrating that its fee request is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

### **III. DISCUSSION**

In this Circuit, adjudication of attorneys' fees in a copyright case requires a three-step process. First, a court determines which party has "prevailed," and then applies a four-factor test to decide whether the prevailing party should receive any fees at all. *Lieb v. Topstone Indus.*, 788 F.2d 151 (3d Cir. 1986). Second, if the prevailing party is to receive some fees, the court calculates a "lodestar," which represents a reasonable number of hours expended solely on successful claims multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433; *see also Washington v. Phila. County Ct. of C.P.*, 89 F.3d 1031, 1035 (3d Cir. 1996). Third, the court may adjust this lodestar up or down based on what is "reasonable under all the circumstances" of the specific case. *Lieb*, 788 F.3d at 156. In this final adjustment, the most important factor is the "degree of success obtained," *Hensley*, 461 U.S. at 436, but an additional set of discretionary factors may also guide this decision, *Lieb*, 788 F.3d at 156.

This Court holds that Plaintiffs are the prevailing party in this action, and that the purposes of the Copyright Act will be furthered by an award of some attorneys' fees to Plaintiffs. This Court also holds, however, that the award will be substantially less than the amount Plaintiffs have requested. Our analysis begins with the reasons why some award of attorneys' fees is justified.

#### **A. Entitlement to Fees**

##### *1. Plaintiffs are the Prevailing Party*

Plaintiffs are clearly the prevailing party in this case. A party is deemed to have prevailed when "they succeed on any significant issue in litigation which achieves some of the benefit [they]

sought in bringing suit.” *Hensley*, 461 U.S. at 433.<sup>1</sup> Defendants argue that Plaintiffs are not, in fact, the prevailing party according to the definition of that term. They assert that “the \$150,000 award . . . is not the dream that Plaintiffs were pursuing” in this action, as Plaintiffs lost their DMCA claim and received only a fraction of the millions of dollars in damages that they originally sought. (Defs.’ Mem. in Supp. of Opp’n at 13.) This argument, while relevant to the degree of success obtained by Plaintiffs, fails to prove that Plaintiffs did not succeed at all. *See Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) (holding that “the *degree* of the plaintiff’s success . . . [is] critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all”) (emphasis in original). It is true that Defendants obtained summary judgment on three of Plaintiffs’ five claims and that Defendants succeeded at trial on the fourth claim. Plaintiffs, however, succeeded on their Copyright Act claim, receiving \$150,000 in damages and also obtaining a permanent injunction against further sales of *1000 Patterns* in the United States. These victories certainly conferred upon Plaintiffs “some of the benefit” they “sought in bringing suit.” *Hensley*, 461 U.S. at 433. Therefore, Plaintiffs surmount this first hurdle and the Court now proceeds to the next step of the inquiry – whether any fees should be awarded.

## 2. *An Award of Some Fees is Appropriate*

*Lieb v. Topstone Industries* is the seminal Third Circuit case regarding attorneys’ fees in copyright cases. 788 F.2d 151 (3d Cir. 1986). In *Lieb*, the Third Circuit held that bad faith by the losing party is not a prerequisite to a fee award. *Id.* at 156. Nor, however, are fees to be awarded

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<sup>1</sup> Although *Hensley* was brought under the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988 (2005), the Court explicitly held that “[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’” 461 U.S. at 433 n.7. This includes Copyright Act cases. *See* 17 U.S.C. § 505 (permitting an award of fees “to the prevailing party” as part of costs).

simply as “a concomitant to prevailing in every case.” *Id.* Instead, a district court operates within a “broad area” when deciding whether to award an attorneys’ fee in a copyright action, because the statute “evidences an intent to rely on the sound judgment of the district courts.” *Id.* at 155-56.

*Lieb* promulgated four non-exclusive factors to guide a district court in exercising its discretion. *Id.* These factors are: (1) frivolousness; (2) motivation; (3) objective unreasonableness (both in the factual and legal components of the case), and (4) the need, in a specific case, for either compensation or deterrence. *Id.* at 156. The *Lieb* Court did “not limit the factors to those we have mentioned, realizing that others may present themselves in specific situations.” *Id.* Because the *Lieb* factors are nonexclusive, not every factor must weigh in favor of the prevailing party for that party to receive fees. *Id.* The Court will now examine each factor in turn.

**a. Frivolousness & Motivation**

The Court finds that, first, the parties did not act frivolously, and second, the parties were not improperly motivated. A frivolous claim is one like that advanced in *Lowe v. Loud Records*, where the plaintiff alleged that the defendants infringed his music copyrights by using his song, but later admitted that he granted defendants a nonexclusive license to use the work. Civ. A. No. 01-1797, 2004 U.S. Dist. LEXIS 4136, at \*2-3, 2004 WL 527831, at \*3 (E.D. Pa. Mar. 17, 2004). Here, by contrast, Plaintiffs’ Copyright Act claim succeeded, so they cannot be deemed frivolous. Moreover, Plaintiffs do not argue that Defendants asserted any defenses that were frivolous. (Pls.’ Mem. at 7.)

Next, parties are improperly motivated only if they do not have “a good faith intent to protect a valid interest, but rather a desire to discourage and financially damage a competitor by forcing it into costly litigation.” *Yankee Candle Co. v. Bridgewater Candle Co., LLC*, 140 F. Supp. 2d 111, 116 (D. Mass. 2001). Plaintiffs do not cast aspersions on Defendants’ motivation. Defendants,

however, express dismay at what they characterize as Plaintiffs' unwillingness to settle, or even to provide a concrete counteroffer to Defendants' multiple settlement offers. These complaints, even if valid, do not amount to a reason to deny Plaintiffs attorneys' fees because these actions do not constitute bad faith attempts to harm a competitor. While Defendants take issue with the manner in which Plaintiffs engaged in settlement negotiations, Defendants never allege that Plaintiffs were not interested in vindicating copyright claims that Plaintiffs believed were valid. *See Diamond Star Bldg. Co. v. Freed*, 30 F.3d 503, 506 (4th Cir. 1994) (refusing to use motivation as factor where no evidence suggested that losing party "was acting maliciously or in bad faith"); *cf. NLFC, Inc. v. Devcom Mid-America*, 916 F. Supp. 751, 759-60 (N.D. Ill. 1996) (concluding party "was not motivated by a good faith intent to prevail, but rather a bad faith attempt" to harm opponent where party neither attempted any discovery whatsoever nor tried to gather any supporting evidence). Absent additional evidence, an unwillingness to settle is not indicative of a bad faith intent to harm.

In sum, neither frivolousness nor motivation will serve as a factor in evaluating Plaintiffs' petition for attorneys' fees.

**b. Objective Unreasonableness**

Objective unreasonableness encompasses both a legal and a factual component. *Lieb*, 788 F.2d at 156. The Court holds that Defendants were legally unreasonable by doggedly pursuing a meritless fair use defense and factually unreasonable by not admitting that they actually copied Plaintiffs' work. These unreasonable positions extended the trial and necessitated higher attorneys' fees, and constitute one reason why some award of attorneys' fees is appropriate in this case.

Of the factors enumerated by *Lieb*, the Second Circuit has accorded "substantial weight" to objective reasonableness. *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121-22 (2d Cir.

2001). This emphasis derives from the Supreme Court's admonition in *Fogerty* that an award of attorneys' fees must comport with the purposes of the Copyright Act. 510 U.S. at 534 n.19. Because reasonable, though losing, litigation positions define the precise boundaries of copyright law, parties who advance such positions should not be punished by the imposition of fees. *See Lotus Dev. Corp. v. Borland Int'l, Inc.*, 140 F.3d 70, 75 (1st Cir. 1998) (refusing to award attorneys' fees where case is novel or close because such a litigation clarifies parameters of copyright law).

i. Legal Unreasonableness

Plaintiffs argue that Defendants advanced an objectively unreasonable legal argument by asserting that the so-called "flat photography" employed by Plaintiffs was not copyrightable. This argument was unreasonable, according to Plaintiffs, because it was based heavily on the opinion of a picture researcher, Vanessa Fletcher (who is not a lawyer), and on a single case, *Bridgeman Art Library v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998). Defendants counter that their defense relied not on *Bridgeman* alone, but rather on the longstanding copyright doctrine that to be copyrightable, works must exhibit some modicum of creativity that is new to the work. It is well settled, contend Defendants, that photographs must be individually inspected to determine if they meet copyright requirements, which is what Defendants requested that the Court do here.

The Court holds that Defendants' argument was not objectively unreasonable and declines to penalize Defendants for advancing it. First, Defendants are correct that photographs are not per se copyrightable. Instead, a court must examine their particular characteristics and assess what creative choices are evident. *See, e.g., Ets-Hokin v. Skyy Spirits*, 225 F.3d 1068, 1073 (9th Cir. 2000); *see also Southco Inc. v. Kanebridge Corp.*, 390 F.3d 276, 281-83 (3d Cir. 2004) (applying same principle to copyrightability of product serial numbers). During discovery, Defendants



repeatedly asked Plaintiffs what creative choices they made, but Plaintiffs refused to respond, calling such information irrelevant. (Defs.' Mem in Supp. of Opp'n Ex. F (Squellatti Decl.) ¶¶ 2, 4-6.) While Plaintiffs were entitled to so refuse, Defendants should not be punished for putting Plaintiffs to their proof.

Second, the *Bridgeman* decision gave Defendants some legal basis for their position, and Defendants tried to extend that case's holding to the instant situation. Although that attempt failed, it served to clarify the extent of the Copyright Act's protections, which furthered the development of copyright law. *See Fogerty*, 510 U.S. at 527 (stating that "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible," and that "to that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them"); *see also MiTek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842-43 (11th Cir. 1999) (explaining that objectively reasonable defenses also "maximize the public exposure to valuable works"); *Lotus*, 140 F.3d at 75 ("When close infringement cases are litigated, copyright law benefits from the resulting clarification of the doctrine's boundaries.").

Nonetheless, Defendants were objectively unreasonable in another aspect of their legal case: Defendants advanced a completely meritless fair use defense, which needlessly complicated the issues presented to the Court and required extensive briefing by both sides. A fair use is one that is made for criticism, comment, news reporting, teaching, or research. 17 U.S.C. § 107 (2005). Here, Defendants' commercial use, which used a large portion of Plaintiffs' copyrighted work and replaced the market for that work, was eminently unfair. *See Infringement Opinion*, 2004 U.S. Dist. LEXIS 23052, at \*34-42 (holding that not a single fair use factor supported Defendants' fair use defense). Defendants, however, repeatedly briefed and argued the issue and did not relent in their position until

trial, thus necessitating extensive briefing by both sides and requiring Plaintiffs to incur significant additional attorneys' fees.

ii. Factual Unreasonableness

Beyond their legally unreasonable fair use defense, the Court also finds that Defendants were factually unreasonable. The case of *Yankee Candle Co. v. Bridgewater Candle Co., LLC*, provides an instructive analogy in this regard. 140 F. Supp. 2d 111 (D. Mass. 2001). In *Yankee Candle*, the plaintiff sued for alleged infringement of its candle labels. At several stages in the case, the court noted the "marked weakness" of the factual elements of the plaintiff's claim, because of "substantial dissimilarities between [the plaintiff's] labels and each of [the defendant's] analogues." *Id.* at 116. Therefore, after the defendant prevailed, the court awarded attorneys' fees to the defendant based in part upon the plaintiff's factual unreasonableness. The instant case presents the converse situation: in *Yankee Candle*, the plaintiff had no evidence of substantial similarity, whereas here, Defendants were faced with overwhelming evidence of substantial similarity. It was obvious, both to Plaintiffs and to the Court, that Defendants' images in *1000 Patterns* were identical to Plaintiffs' photographs, and that Defendants had actually copied Plaintiffs' photographs. *See Infringement Decision*, 2004 U.S. Dist. LEXIS 23052, at \*31-32.

Despite these obvious similarities, Defendants refused to admit until two days before the close of discovery that they had access to Plaintiffs' books. (*See* Pls.' Trial Ex. 21 at RFA 1.) Defendants also disputed that they had removed images from Plaintiffs' books, scanned them into a computer, and included the scanned images in *1000 Patterns*. (Pretrial Stip. Ex. A at ¶¶ 225-32.) Finally, Defendants did not produce, until the very last day of discovery, the cut-up Schiffer books from their files, notwithstanding that Plaintiffs had asked for this information more than four months

earlier. (R. at 54 (Aug. 23, 2004).) These actions and denials unnecessarily extended the trial, as evidenced by the twenty-five pages of trial transcript wherein Plaintiffs' counsel laboriously established the identity of images between the Schiffer books and *1000 Patterns* by making Ivy's publisher compare those images. (R. at 84-109 (Aug. 24, 2004).) Accordingly, Defendants' factual unreasonableness, as well as their legal unreasonableness, will serve as one factor in the Court's decision to award some attorneys' fees in this action.

**c. Compensation and Deterrence**

The final factor that the Court must consider in deciding whether some award of fees is appropriate is whether a fee award is necessary either to compensate the prevailing party, deter the losing party, or both. *See Lieb*, 788 F.2d at 156. Compensation "helps to ensure that all litigants have equal access to the courts to vindicate their statutory rights. It also prevents copyright infringements from going unchallenged where the commercial value of the infringed work is small and there is no economic incentive to challenge an infringement through expensive litigation." *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981); *see also Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (awarding attorneys' fees "assures equal access to courts [and] provides an economic incentive to challenge infringements"); *A & N Music Corp. v. Venezia*, 733 F. Supp. 955, 959 (E.D. Pa. 1990) (same).

In this case, Plaintiffs are all relatively small entities: a company with between 20-30 employees, three individuals, and a non-profit group. (R. at 8, 105, 110, 140, 212-13 (Aug. 23, 2004).) And, although Plaintiffs sought enormous statutory damages, their actual damages were not large. Therefore, without some amount of compensatory attorneys' fees, copyright protection would be effectively precluded for Plaintiffs because of the high cost of litigation. *See Original*

*Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 466 (E.D. Pa. 1987) (awarding attorneys’ fees in part because it “helps to ensure that all litigants have equal access to the courts to vindicate their statutory rights” notwithstanding their size); *see also M.S.R. Imports, Inc. v. R.E. Greenspan Co.*, Civ. A. No. 81-3223, 1983 U.S. Dist. LEXIS 17397, at \*45-46, 1983 WL 1778, at \*16 (E.D. Pa. Apr. 27, 1983) (awarding attorneys’ fees in part to compensate small business copyright owner because “[t]he copyright laws serve to protect the rights of the creator and the author of original works whether such works are of great or relatively modest monetary value”).

Therefore, compensating Plaintiffs with some measure of attorneys’ fees advances the “primary objective” of the Copyright Act – “to encourage the production of original literary, artistic, and musical expression for the good of the public.” *Fogerty*, 510 U.S. at 534 n.19. This Court noted above that meritorious copyright defenses should be encouraged, so that the “boundaries of copyright law” are “demarcated as clearly as possible.” *Id.* at 527. On the other hand, authors are encouraged to create protectible works in the first place, and thus “promote the Progress of Science and useful Arts,” in part because they know their rights can be enforced through the successful prosecution of any infringement. U.S. CONST. art. I, § 8, cl. 8. This logic applies equally to all copyright holders, irrespective of their size or the commercial success of their works.

An award of fees is not necessary, however, to deter Defendants from repeating their actions. First, and most importantly, the Court has already taken deterrence into account as part of its rationale for imposing statutory damages. *See Damages Opinion*, 2005 U.S. Dist. LEXIS 416, at \*26-27. The Court stated that its award was made “in an amount that ensures Defendants will not engage in similar infringing behavior in the future.” *Id.* at \*27. Second, Defendants have affirmed that, as a result of this lawsuit, they have “reviewed and altered editorial policies and procedures,”

both to accord with the Court's ruling and to prevent similar incidents in the future. (Defs.' Mem. in Supp. of Opp'n Ex. A (Carswell Aff.) ¶ 13.) The Court is thus satisfied that sufficient deterrence has already been effected.

In conclusion, the Court holds that Plaintiffs are entitled to some measure of attorneys' fees because: (1) Defendants were factually and legally unreasonable; and (2) a fee award is necessary to compensate Plaintiffs.

### **B. Determining the Lodestar**

Having found that some award of fees is appropriate, the Court must now determine what amount is reasonable. This process begins by calculating a "lodestar," which is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *see also Washington*, 89 F.3d at 1035. Plaintiffs suggest that, in this case, the lodestar is \$828,055.00. The party seeking fees carries the burden of demonstrating that its requested fee is reasonable, and thus must submit evidence that supports the hours worked and the hourly rates claimed. *Hensley*, 461 U.S. at 433. A court has the "affirmative function" to "review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude" those which were not reasonably expended. *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). All hours not "reasonably expended" must be excluded. *Hensley*, 461 U.S. at 434. Hours are not reasonably expended if they are excessive, redundant, otherwise unnecessary, or were spent litigating unsuccessful claims which were "distinct in all respects from" successful claims. *Hensley*, 461 U.S. at 434 (citations omitted).

After the fee petitioner submits its evidence, the fee opponent then has the burden to challenge the reasonableness of the requested fee. *Rode*, 892 F.2d at 1183. Although the fee

opponent must make its objections clear, it need not “point to all the entries that they believe to be unreasonable.” *Bell*, 884 F.2d at 720. Rather, the opponent’s “objections are adequate . . . if they allege that the hours spent on particular categories of work are excessive.” *Gaffney v. City of Allentown*, Civ. A. No. 97-4455, 1998 U.S. Dist. LEXIS 242, at \*15, 1998 WL 32758, at \*4 (E.D. Pa. Jan. 7, 1998). A court has “a great deal of discretion” to adjust the fee award based on those objections. *Rode*, 892 F.2d at 1183. The court may not, however, “decrease a fee award based on factors not raised at all by the adverse party.” *Bell v. United Princeton Props., Inc.*, 884 F.2d 713, 720 (3d Cir. 1989).

Here, Defendants do not object to the reasonableness of Plaintiffs’ hourly rates, which range from \$135.00 to \$465.00.<sup>2</sup> (Defs.’ Mem. in Supp. of Opp’n at 27.) Defendants forcefully object, however, to the number of hours that Plaintiffs expended on this case and the reasonableness of those hours. Defendants assert that Plaintiffs’ time entries are inadequately documented, that Plaintiffs billed excessive hours, and that Plaintiffs billed redundant hours.

#### *1. Inadequate Documentation*

The Court must first examine the sufficiency of Plaintiffs’ “evidence supporting the hours worked.” *Hensley*, 461 U.S. at 433. Where “the documentation of hours is inadequate, the district court may reduce the award accordingly.” *Id.* In this Circuit, a fee petition “is required to be specific enough to allow the district court ‘to determine if the hours claimed are unreasonable for the work performed.’” *Rode*, 892 F.2d at 1190 (*quoting Pawlak v. Greenawalt*, 713 F.2d 972, 978 (3d Cir.

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<sup>2</sup> Plaintiffs have submitted records from eleven individuals, at the following rates: SJ Myers (\$365.00-\$385.00); NR Frandsen (\$325.00-\$365.00); CL Slipski (\$295.00-\$310.00); DP Reilly (\$175.00-\$225.00); PE Abromats (\$290.00); AH Seidel (\$465.00); J. Fries (\$285.00-\$305.00); HE Perkins (\$325.00-\$335.00); HM Miller (\$170.00); JL Dale (\$145.00); A. Trautner (\$135.00-\$145.00).

1983)). Accordingly, the petition should contain “some fairly definite information as to the hours devoted to various general activities,” because without such information “the court cannot know the nature of the services for which compensation is sought.” *Lindy Bros. Builders, Inc. v. Am. Radiator & Std. Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973).

Plaintiffs have submitted a chronologically-ordered, computer-generated compilation of the time sheet entries for all the time they charged to this case. (See Rubner-Frandsen Decl. Ex. A.) This form of submission generally complies with the Third Circuit’s requirements. See *Rode*, 892 F.2d at 1190-91. Many of Plaintiffs’ entries, however, have been heavily redacted, eliminating all reference to the activities to which the hours were devoted.<sup>3</sup> Such wholesale redaction is particularly troublesome where, as here, Plaintiffs brought several claims that ultimately failed. The Court may not award fees for time spent on these claims, and where Plaintiffs have given no indication of their attorneys’ activity, the Court cannot determine if the corresponding hours are reasonable. *Rode*, 892 F.2d at 1190. The Court will therefore exclude from the lodestar those entries for which the redaction is so pervasive that it is simply impossible to determine “the nature of the services for which compensation is sought,” *Lindy Bros.*, 487 F.2d at 167, because in these instances, Plaintiffs have failed to meet their burden to adequately document the hours expended. See *Muraresku v. Amoco Oil Co.*, 648 F. Supp. 347, 350 (E.D. Pa. 1986) (stating that where descriptions of services

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<sup>3</sup> The following is a small sample of such submissions: “Review [REDACTED] y [sic] P. Schiffer”; “Review [REDACTED]”; “Telephone conference with N. Frandsen re [REDACTED]”; “Discussion w/ C. Slipski regarding [REDACTED]”; “Prepare [REDACTED]”; “Research [REDACTED].” (Rubner-Frandsen Decl. Ex A at 1 ¶ 5; *id.* at 2 ¶ 4; *id.* at 3 ¶ 2; *id.* at 11 ¶ 7; *id.* at 19 ¶ 7; *id.* at 46 ¶ 7.) The Court has eliminated only those entries whose purposes could not be divined even in part; accordingly, the Court has allowed fees for such entries as “Internal w/ C/ Slipski; legal research [REDACTED] begin response to motion to strike Weisgrau report,” as some of the nature of the services could be determined. (*Id.* at 55 ¶ 4.)

were too vague to be helpful, it was “impossible to determine if all the fees claimed were ‘reasonably expended,’” requiring reduction in lodestar). The Court has extracted 224.9 hours for such inadequately documented activities, resulting in an exclusion of \$69,922.00 from the lodestar.

## 2. *Excessive Hours*

As stated above, because the lodestar derives from the number of hours “reasonably expended on the litigation,” all “excessive” hours must be excluded from the calculation of the lodestar. *Hensley*, 461 U.S. at 433-34; *see also Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 178 (3d Cir. 2001) (instructing that district court “has a positive and affirmative function in the fee fixing process, not merely a passive role”).

The Court finds that Plaintiffs have charged excessive hours for their work in several respects and will therefore reduce Plaintiffs’ fee award on this basis. First, Plaintiffs’ attorneys have documented excessive amounts of time for trial preparation. This case was tried on August 23 and 24, 2004, for approximately eight hours each day. The parties called a total of eleven witnesses. Plaintiffs used six attorneys and legal assistants to prepare for trial, who collectively billed 560.2 hours to “trial preparation,” totaling \$160,786.00. This is the equivalent of slightly more than 70 full eight hour days to prepare for a trial that lasted just two days. The Court holds that this amount is excessive, and will reduce this amount by half, to \$80,393.00. *See Maldonado*, 256 F.3d at 185-88 (3d Cir. 2001) (reiterating court’s “positive and affirmative function in the fee fixing process” and reducing number of hours spent on preparation for oral argument from 169.35 to 24.00, and overall hours spent for work on appeal from 575.81 to 219.85, as time claimed was not reasonable for services performed).



Second, the Court finds that the amounts charged by attorney Harriet E. Perkins for services in this case are excessive. A court may reduce time charges billed at partner rates “where the court concludes that the work could have been performed by junior associates or paralegals and in that regard is not bound to defer to the judgment of the law firm seeking fees as to its allocation of work among its legal personnel.” *Joy Mfg. Corp. v. Pullman-Peabody Co.*, 742 F. Supp. 911, 916 (W.D. Pa. 1990) (citing *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 591 (3d Cir. 1984)); see also *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998) (stating that “[c]lerical tasks ought not to be billed at lawyer’s rates, even if a lawyer performs them”). Perkins is a partner at Drinker Biddle & Reath. In this action, she charged 36.2 hours, at a rate of \$325.00 per hour, for “preparing trial exhibits” and “designat[ing] findings of fact.” (See Rubner-Frandsen Decl. Ex. A at 59 ¶¶ 2, 9; *id.* at 61 ¶ 6; *id.* at 62 ¶ 4; *id.* at 63 ¶ 4; *id.* at 64 ¶ 4; *id.* at 65 ¶ 3.) These activities are not generally the province of partners with nearly twenty years of practice experience. Indeed, Plaintiffs used a paralegal for the same type of work elsewhere in their billing records. (See *id.* at 8 ¶ 7 (time entry of paralegal A. Trautner for “Preparation of Exhibits for Complaint”).) Accordingly, the Court will reduce the hourly compensation for these entries to \$175.00 per hour, the rate billed by junior associate Daniel P. Reilly. This results in a reduction of \$5,430.00. Perkins also billed 19.5 hours to digesting deposition transcripts and “get[ting] cites for briefs” at \$335.00 per hour. (*Id.* at 72 ¶¶ 4, 8.) These are also tasks more appropriately performed by an associate, and the Court will accordingly reduce the amount for this work to \$225.00 per hour, resulting in a reduction of \$2,145.00.<sup>4</sup>

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<sup>4</sup> Between 2003 and 2004, Drinker Biddle apparently increased its rates for Perkins from \$325.00 per hour to \$335.00 per hour; and its rates for Reilly from \$175.00 per hour to \$225.00 per hour. The Court has therefore reduced Perkins’s charges in 2003 from \$325.00 to \$175.00

In sum, the Court excludes a total of \$87,968.00 from the lodestar for excessive hours.

### 3. Redundancy

Redundant or duplicative hours are also eliminated from the lodestar calculation. *See Evans v. Port Auth. of N.Y. & N.J.*, 273 F.3d 346, 363 (3d Cir. 2001); *T.B. Proprietary Corp. v. Sposato Builders, Inc.*, Civ. A. No. 94-6745, 1996 U.S. Dist. LEXIS 12331, at \*9, 1996 WL 488940, at \*3 (E.D. Pa. Aug. 23, 1996) (stating that “the court will not award duplicative fees,” and reducing counsels’ fees for doubly-attended depositions). Reductions for duplicative hours may be made “if the attorneys are unreasonably doing the same work.” *Rode*, 892 F.2d at 1187-88 (*quoting Jean v. Nelson*, 863 F.2d 759, 773 (11th Cir. 1988)). The Court will make two such reductions in this case: one for the redundant staffing at depositions and meetings, and the second for redundant staffing at trial.

In the context of depositions, the Third Circuit has stated that “[i]n many cases, the attendance of additional counsel representing the same interests as the lawyers actually conducting the deposition is wasteful and should not be included in a request for counsel fees from an adversary.” *Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939, 943 (3d Cir. 1995). Here, Plaintiffs have submitted numerous redundant charges relating to depositions. In May and June of 2004, the parties deposed witnesses in San Francisco and London. Plaintiffs charged for both Nancy Rubner-Frandsen (Plaintiffs’ lead counsel) and for Cheryl Slipski (the senior associate on the case) to prepare for these depositions, for both attorneys’ travel time, for both attorneys’ deposition attendance, and for both attorneys’ review of the material gleaned from the depositions. (*See* Rubner-Frandsen Decl. Ex. A at 38 ¶¶ 7-8; *id.* at 39 ¶¶ 5-6; *id.* at 40 ¶ 5 & 41 ¶ 6; *id.* at 42 ¶¶ 2-3;

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per hour, and those for 2004 from \$335.00 to \$225.00 per hour.

*id.* at 43 ¶¶ 4-5; *id.* at 43 ¶ 8 & at 44 ¶ 1; *id.* at 44 ¶¶ 2-3, 5-10.) The Court will eliminate the time charged by Slipski, and allow only the time charged by Rubner-Frandsen to be included in the lodestar calculation. The Court will similarly reduce the time for Slipski for her superfluous attendance at two meetings with Peter Schiffer (*id.* at 2 ¶ 1; 20 ¶ 2), at a telephone conference with Leslie Piña (*id.* at 14 ¶ 6), and at a conference with this Court (*id.* at 18 ¶ 2). These redundant charges total 150.7 hours of Slipski's time, amounting to \$43,827.00 that will be excluded from the lodestar calculation.

The Court will also reduce the lodestar for redundant staffing at trial. *See W. Va. Univ. Hosps. v. Casey*, 898 F.2d 357, 365 (3d Cir. 1990) (holding that more than two counsel at oral argument is unnecessary); *Taylor v. USF-Red Star Express, Inc.*, Civ. A. No. 03-2216, 2005 U.S. Dist. LEXIS 3599, 2005 WL 555371 (E.D. Pa. Mar. 8, 2005) (eliminating forty-four hours from lodestar calculation due to "unnecessary and redundant" use of three senior attorneys during trial). As noted above, the trial in this action took two days. Plaintiffs billed for a team of four lawyers on day one (three partners and an associate), and five lawyers on day two (three partners and two associates). Of the attorneys present, neither Harriet Perkins nor Daniel Reilly examined any witnesses. The Court believes that two partners and one associate were adequate to try this case, and therefore eliminates the hours billed by Perkins and Reilly at trial. Perkins billed 20.8 hours, totaling \$6,968.00, and Reilly billed 11.6 hours, totaling \$2,610.00. The Court will reduce the lodestar by \$9,578.00 for their redundant attendance. In sum, the Court excludes a total of \$53,405.00 from the lodestar for redundant or duplicative charges.

#### 4. *The Final Lodestar*

To conclude, Plaintiffs have requested \$828,055.00 in attorneys' fees. The Court has excluded a total of \$211,295.00 in inadequately documented, excessive, and redundant bills.<sup>5</sup> Accordingly, the lodestar in this action is \$616,760.00.

### **C. Adjusting the Lodestar**

Having determined the lodestar, the Court now proceeds to the third and final part of the fee calculation by considering what amount is reasonable under all the circumstances of this case. *Lieb*, 788 F.3d at 156. Although the lodestar is presumed to produce a reasonable fee, the Court "can adjust the lodestar downward if the lodestar is not reasonable." *Rode*, 892 F.2d at 1183. The fee opponent has the burden of proving that such an adjustment is necessary. *Id.*

There are five possible bases for reducing the lodestar. The first and most important applies to all types of actions, and permits a district court, in its discretion, to reduce the ultimate fee awarded in light of the degree of success achieved by the prevailing party. *Hensley*, 461 U.S. at 436; *see also Tex. State Teachers Ass'n*, 489 U.S. at 790. In the copyright field, four other potential grounds for lodestar adjustments have been outlined by the Third Circuit: the relative complexity of the litigation; the relative financial strength of the parties; the damages awarded; and whether the losing party acted in bad faith. *Lieb*, 788 F.2d at 156.

#### *1. Degree of Success Obtained*

If "a plaintiff has achieved only partial or limited success," the lodestar "may be an excessive amount. This will be true even when the plaintiff's claims were interrelated, nonfrivolous, and

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<sup>5</sup> The Court will not reduce the lodestar based on distinct unsuccessful claims. Although Plaintiffs succeeded on only their copyright claim, the other four claims asserted were not "distinct in all respects" from that claim. *Cf. Hensley*, 461 U.S. at 433. Instead, all the claims related to an identical factual background and depended on similar discovery. Therefore, the reductions in fees for these claims are more properly analyzed under Part C, *infra*.

raised in good faith.” *Hensley*, 461 U.S. at 436. This is because “the most critical factor” in determining the size of a fee award is “the degree of success obtained.” *Id*; *see also Washington*, 89 F.3d at 1042 (calling it a “settled principle . . . that counsel fees should only be awarded to the extent that the litigant was successful”). “There is no precise rule or formula for making these determinations,” and if the court makes a downward adjustment for partial success, it “may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.” *Hensley*, 461 U.S. at 436-37.

One widely accepted method of measuring the level of success a plaintiff has achieved is to consider the amount of damages awarded compared to the amount of damages requested. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Washington*, 89 F.3d at 1042 (noting that “[t]he amount of damages awarded, when compared with the amount of damages requested, may be one measure of how successful the plaintiff was in his or her action”). When plaintiffs have received far less damages than they originally sought, courts have often reduced the lodestar. *See, e.g., Washington*, 89 F.3d at 1043 (upholding fee reduction in part because damages award amounted to only 4% of the damages demand and was thus indicative of plaintiff’s lack of success); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (upholding lodestar adjustment from \$9,783.63 to \$500.00 where damages award “was a mere five percent of the amount of statutory damages [plaintiff] initially sought”); *Sheffer v. Experian Info. Solutions, Inc.*, 290 F. Supp. 2d 538, 551 (E.D. Pa. 2003) (reducing lodestar by two-thirds on basis of disparity between ultimate award and initial demand); *Hall v. Am. Honda Motor Co.*, Civ. A. No. 96-8103, 1997 U.S. Dist. LEXIS 18544, at \*11, 1997 WL 732458, at \*3-4 (E.D. Pa. Nov. 24, 1997) (reducing fee award where plaintiff received 8% of initial demand); *Hilferty v. Chevrolet Motor Div. of Gen. Motors Corp.*, Civ. A. No. 95-5324,

1996 U.S. Dist. LEXIS 7388, at \*24-25, 1996 WL 287276, at \*5-7 (E.D. Pa. May 30, 1996) (reducing fee award by approximately two-thirds where plaintiff recovered only 8% of damages sought).

Here, Defendants argue that Plaintiffs' fee request is outrageous in light of the enormous disparity between the amount of damages that Plaintiffs sought and the amount that this Court ultimately awarded. Plaintiffs originally sought \$25,000.00 per photograph for DMCA violations of 118 photographs, totaling \$2,950,000.00. (Pls.' Mem. in Supp. of Stat. Damages at 27.) In their pretrial Findings of Fact, Plaintiffs requested \$38,000.00 in damages on their Copyright Act claim for each of 118 photographs, totaling \$4,484,000.00. (Pls.' Findings of Fact ¶ 57.) They later amended that request to one based on the number of books infringed, and requested \$150,000.000 in damages for each of thirteen books – a total of \$1,950,000.00. (Pls.' Mem. in Supp. of Stat. Damages at 19-20.) The Court eventually awarded a total of \$150,000.00 in statutory damages for the entire action.

The Court agrees that this disparity is significant and, accordingly, reduces the lodestar by two-thirds because of Plaintiffs' limited success. Plaintiffs ultimately recovered just over 2% of their highest damages demand (based on their DMCA claim and their per-photograph Copyright Act damages calculation). Even if the copyright damages sought by Plaintiffs are viewed from a per book, instead of a per photograph, basis, Plaintiffs only recovered about 3% of their demand (including their DMCA claim). And, finally, even if the Court discounts all of Plaintiffs' requested DMCA damages and calculates the ratio of their recovery based solely on their Copyright Act claim, and again on a per-book basis, Plaintiffs received just 7.6% of their damages demand. These ratios

certainly constitute “partial or limited success,” and justify a reduction to the lodestar. *Hensley*, 461 U.S. at 436.

In addition to achieving but limited success on their requested damages, Plaintiffs achieved limited success based on the number of claims they originally asserted. Plaintiffs’ Complaint contained five claims, three of which were dismissed on summary judgment and a fourth which failed at trial. *See Summary Judgment Opinion*, 350 F. Supp 2d at 618-20; *Infringement Opinion*, 2004 U.S. Dist. LEXIS 23052, at \*42-46. Moreover, even on their Copyright Act claim, Plaintiffs’ success was limited. Plaintiffs requested damages on thirteen books, but were awarded damages on only ten because the remaining three had ineffective copyright registrations. *See Damages Opinion*, 2005 U.S. Dist. LEXIS 416, at \*9-12. Plaintiffs’ lead attorney, Nancy Rubner-Frandsen, has submitted an affidavit stating that Plaintiffs have already removed from their fee request “all attorneys[’] fees that relate to the unsuccessful claims from the Complaint, including the claims under the Digital Millennium Copyright Act and the Lanham Act.” (Rubner-Frandsen Decl. ¶ 3.) Yet, at oral argument, Rubner-Frandsen stated that she had removed just 100 hours of attorney time to account for all unsuccessful claims and the unsuccessful portion of the Copyright Act claim. (R. at 18 (Apr. 6, 2005).) In this petition, Plaintiffs seek compensation for 2683.6 hours of time. (Rubner-Frandsen Decl. Ex. A at 78.) It is simply not plausible that the successful portion of the Copyright Act claim commanded twenty-six times the number of hours as the four other claims and the unsuccessful part of the Copyright Act claim combined.

Given the large disparity between the damages ultimately awarded and those originally sought, as well as the related claims on which Plaintiffs failed to recover at all, the Court concludes

that Plaintiffs' success was limited and decreases the lodestar by two-thirds. Accordingly, the lodestar is reduced from \$616,760.00 to \$205,586.67.

## 2. *Complexity of the Litigation*

Beyond the general lodestar reduction for limited success, courts in copyright cases may also adjust the lodestar on four other grounds. The first of these is the complexity of the case. Complexity is measured by the obvious factors, such as the number of parties involved, the number of claims at issue, and the difficulty of the legal questions at hand. *See, e.g., Alameda Films SA De CV v. Authors Rights Restoration Corp.*, 331 F.3d 472, 485 (5th Cir. 2003) (holding that complexity of case could support attorneys' fee award where more than a dozen parties asserted various claims, cross-claims, and counterclaims, many involving interaction between Mexican and American copyright law); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 832 (11th Cir. 1982) (finding that where case had tortured procedural history and parties argued copyright, trade dress, and unfair competition claims turning on intricate questions of registration and originality, complexity merited consideration in assessing attorneys' fees).

Both parties concede that this litigation was not inherently complex. (Pls.' Mem. at 18; Defs.' Mem. in Supp. of Opp'n at 34.) Each party, however, blames the other for unnecessarily complicating the action. Plaintiffs argue that because Defendants would not concede actual copying, the case became more complicated. (Pls.' Mem. at 18-19.) Defendants, in turn, contend that Plaintiffs made the case more complex by including several unsupportable claims, like the Lanham Act and unfair competition claims, in their Complaint and extensively briefing these issues. (Defs.' Mem. in Supp. of Opp'n at 34-35.)



The Court will not adjust the lodestar on the basis of complexity. While there were five Plaintiffs, all had essentially the same interests, and none made claims that the others did not. Similarly, the two Defendants were identically situated, and advanced identical arguments. Finally, the legal issues at stake were relatively straightforward, given that the issue of actual copying (ordinarily a difficult process of determining substantial similarity) was obvious, and therefore the only issue on the Copyright Act claim was whether Plaintiffs' photographs were copyrightable. This claim was not inherently complex, in that it did not present unsettled issues of law. While the Third Circuit had not previously decided a case on the copyrightability of photographs, the Second and Ninth Circuits have adjudicated many such cases, and those decisions provided this Court with ample instruction regarding the elements of originality that photographs must possess to be copyrightable. *See, e.g., Ets-Hokin*, 225 F.3d at 1075; *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992); *United States v. Hamilton*, 583 F.2d 448, 452 (9th Cir. 1978).

### 3. *Relative Financial Strength of the Parties*

Another of *Lieb*'s lodestar-adjustment factors is the "relative financial strength of the parties." *Lieb*, 788 at 156. A fee award should not be either "disproportionate to the amount at stake" or "excessive in light of the [losing party's] resources," as "the aims of the statute are compensation and deterrence where appropriate, but not ruination." *Lieb*, 788 F.2d at 156.

Defendants assert that the Ivy Press is in dire financial straits as a result of this action. (Defs.' Mot. Ex. C (Manstead Aff.) ¶ 9; *id.* Ex. D (Pay Aff.) ¶¶ 25-26.) Defendants further state that because the contract between Chronicle and Ivy obligates Ivy to indemnify Chronicle for any damages or costs in connection with a lawsuit for copyright infringement, the full brunt of this

Court's award will fall upon Ivy's shoulders. (Defs.' Mem. in Supp. of Opp'n Ex. A (Carswell Aff.) ¶ 14.) The Court is not insensitive to these arguments. However, no evidence has been submitted regarding the financial strength of the Plaintiffs, other than that Schiffer has between 26 and 30 employees. Similarly, there is no evidence of Chronicle's financial strength, beyond that it employs approximately 160 people. (Pls.' Mem. Ex. 4.) Because of the dearth of information, the Court cannot weigh the parties' "relative financial strength," as required by the Third Circuit. Accordingly, the Court will not use this factor to reduce the lodestar. The Court is mindful of *Lieb*'s admonition that "the aims of the statute are compensation and deterrence, but not ruination," and believes that the other reductions to Plaintiffs' fee request spare Defendants from this fate.<sup>6</sup>

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<sup>6</sup> Moreover, to the extent that Defendants argue Chronicle should not be held jointly and severally liable for this award of attorneys' fees, their argument is rejected. Defendants rely on *Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F. Supp. 1347 (S.D.N.Y. 1987), for the proposition that even though this Court has held Chronicle jointly and severally liable for statutory damages, an award of attorneys' fees may nevertheless be inappropriate because Chronicle did not select content for *1000 Patterns*, instead relying on Ivy's representations regarding copyright clearance. (Defs.' Mem. in Supp. of Opp'n at 25-26.) This argument is unavailing because *Dolori* is distinguishable from the instant action. In *Dolori*, the owner of a copyrighted dress pattern sued both the manufacturer of an infringing pattern and the retailer of dresses made with the infringing pattern, which it bought from the infringing manufacturer. The court held that the manufacturer intentionally infringed the owner's copyright, but that the retailer's infringement was unintentional, because the retailer took no part in the creation of the infringements, and, importantly, because the retailer "never received notice, until the commencement of this suit, that the pattern infringed upon [the plaintiff's] copyright." *Dolori*, 662 F. Supp. at 1354.

Here, by contrast, Chronicle did participate in the infringement. Chronicle designed and created the cover of *1000 Patterns*' United States edition, and it, not Ivy, selected and placed three of Plaintiffs' photographs on that cover. (R. at 149-51; 166-72 (Aug. 24, 2004).) Moreover, unlike the retailer in *Dolori*, Chronicle had abundant notice of this action – in fact, Chronicle knew about Plaintiffs' concerns even before Ivy did. (*Id.* at 159.) Accordingly, as Chronicle was aware of and participated in the infringement of Plaintiffs' works, Chronicle will be held jointly and severally liable for the attorneys' fees and costs in this action.

#### 4. *Damages Awarded & Bad Faith*

Neither of *Lieb*'s final two bases for lodestar adjustment are applicable here. First, a court in this district has held that while it took into account the gross amount of the damage award, it did not place great significance on that factor. *Broadcast Music, Inc. v. Golden Horse Inn Corp.*, 709 F. Supp. 580, 582 (E.D. Pa.1989). Here, there is no reason to increase the lodestar in light of damages awarded, as Plaintiffs will recover some measure of attorneys' fees and have already received a not-insubstantial sum in statutory damages. Second, the Court has previously held that Defendants' infringements were not willful; in other words, that Defendants neither actually knew they were infringing Plaintiff's copyrights nor recklessly disregarded that possibility. *See Damages Opinion*, 2005 U.S. Dist. LEXIS 416, at \*15-21. Moreover, neither Plaintiffs nor Defendants argue that the other party acted in bad faith. The factor of bad faith will therefore not be used in adjusting the lodestar.

#### **D. Costs**

Finally, this Court must determine the amount of costs to which Plaintiffs are entitled. In its discretion, a court in a copyright action "may allow the recovery of full costs by or against any party." 17 U.S.C. § 505 (2005). The term "full costs" refers to those items allowed pursuant to 28 U.S.C. § 1920 (2005). *See, e.g., Barrera v. Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400, 405 (E.D.N.Y. 2004) (holding that "'full costs' referred to in § 505 of the Copyright Act are commensurate with those costs allowed under 28 U.S.C. § 1920"); *Boisson v. Banian Ltd.*, 221 F.R.D. 378, 379 (S.D.N.Y. 2004) (same). The costs allowed under § 1920 are: (1) fees of the clerk or marshal; (2) expenses for transcripts made by the court reporter; (3) fees and disbursements for

printing and witnesses; (4) copying expenses; (5) docket fees; and (6) compensation of court appointed experts and of interpreters. 28 U.S.C. § 1920.

Plaintiffs originally requested \$121,040.38 in costs, but have reduced this request because some costs initially sought related to postage, telephone calls, attorney travel, and legal research, which Plaintiffs concede are not compensable under § 1920. (*See* Pls.’ Post-Hrg. Supp. Br. at 15.) Accordingly, Plaintiffs submitted an amended request of \$63,069.94. The Court has reviewed this amended request and finds that it is reasonable, with one exception: Plaintiffs are not entitled to \$12,507.50 that they seek in expert witness costs.

As noted, a prevailing party in a copyright case may recover from its opponent “fees . . . for . . . witnesses.” 28 U.S.C. § 1920(3). Section 1821 of Title 28 limits this fee to \$40.00 per witness for each day of their attendance at trial. 28 U.S.C. § 1821(b)(2005). In the absence of “explicit statutory or contractual authorization for the taxation of the expenses of a litigant’s witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.” *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Because the “full costs” language of § 505 “does not constitute clear, explicit, or plain evidence of congressional intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other statutes . . . expert witness fees taxable as costs pursuant to § 505 are limited” to \$40.00 per day. *Artisan Contractors Ass’n of Am., Inc. v. Frontier Ins. Co.*, 275 F.3d 1038, 1040 (11th Cir. 2001); *Pinkham v. Camex, Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (holding that in copyright cases “expert witness fees in excess of the 28 U.S.C. § 1821(b) \$40[.00] limit are not recoverable”). Plaintiffs’ expert witness, Richard Weisgrau, testified for one day at trial. (R. at 257-74 (Aug. 23, 2004).) Therefore, Plaintiffs are entitled to a witness cost of

\$40.00 for Weisgrau, and Plaintiffs' request for costs will be reduced in the amount of \$12,507.50.

Plaintiffs are accordingly awarded \$50,562.44 in costs.

#### **IV. CONCLUSION**

For the reasons set forth above, Plaintiffs' motion for costs and attorneys' fees pursuant to 17 U.S.C. § 505 is granted in part and denied in part. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>SCHIFFER PUBLISHING, LTD., et al.,</b>	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>CHRONICLE BOOKS, LLC, et al.,</b>	:	<b>No. 03-4962</b>
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this **24<sup>th</sup>** day of **May, 2005**, upon consideration of Plaintiffs' Motion for Attorneys' Fees and Costs (Document No. 63), Defendants' Opposition thereto (Document No. 66), Plaintiffs' Reply thereon (Document No. 70), oral argument thereon, the parties' supplemental submissions thereon (Document Nos. 73 & 74), and for the foregoing reasons, it is hereby **ORDERED** that Plaintiffs' Motion is **GRANTED in part and DENIED in part**, as follows:

Judgment is **ENTERED** in favor of Plaintiffs and Against Defendants in the amount of Fifty Thousand Five Hundred and Sixty-Two Dollars and Forty-Four Cents (\$50,562.44) in costs and Two Hundred and Five Thousand Five Hundred and Eighty-Six Dollars and Sixty-Seven Cents (\$205,586.67) in attorneys' fees pursuant to 17 U.S.C. § 505.

**BY THE COURT:**

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**Berle M. Schiller, J.**